In the

United States Court of Appeals

For the Seventh Circuit

No. 12099

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GRANT W. SMITH, Defendant-Appellant	Appeal from the United States District Court for the Northern District of Illinois. Honorable John P. Barnes, Judge Presiding.

APPELLEE'S BRIEF AND APPENDIX

R. Tieken
United States Attorney

John Peter Lulinski
Assistant United States Attorney

D. Arthur Connelly
Assistant United States Attorney
Of Counsel

The Schaffer Press, Inc., Chicago, Illinois—12-9-57—50

INDEX

	PAGE
Index	i
List of Authorities Cited	i
Statement of Facts	1
Summary of Argument	2
Contested Issues	3
Propositions of Law Relied Upon	4
Argument	6
Conclusion	30

CASES CITED.

Adams v. United States, 9 Cir. (1951), 191 F. 2d 206	30
Apodaca v. United States, 10 Cir. (1951), 188 F. 2d 932	30
Barber v. Yanish, 9 Cir. (1952), 196 F. 2d 53, cert. den. 344 U.S. 817	10
Dow v. Carnegie Illinois Steel Corp., 3 Cir. (1955), 224 F. 2d 414, cert. den. 350 U.S. 971	8
Glasser v. United States, 315 U.S. 60	7
Larrison v. United States, 7 Cir. (1928), 24 F. 2d 82	18
Martin v. United States, 5 Cir. (1927), 17 F. 2d 973	29
Matsuo v. Dulles, 133 F. Supp. 711	10
McGuire v. United States, 8 Cir. (1945), 152 F. 2d 577, 580	12
Nichamin v. United States, 6 Cir. (1920), 263 F. 880, 882	16
People v. Madison County, 125 Ill. 334	9

PAGE

People v. Peterson, 153 Ill. App. 480 9

Thiel v. Southern Pacific Co., 328 U.S. 217 8

United States v. Barton, 2 Cir. (1943), 134 F. 2d 484 485 13

United States v. Brandt (1955), 139 F. Supp. 349 7

United States v. Chiarelli, 7 Cir. (1951), 192 F. 2d 528, 531 10

United States v. Detente, 7 Cir. (1952), 199 F. 2d 286, 288 10

United States v. Feinberg, 7 Cir. (1941), 123 F. 2d 425 10

United States v. Kadison, 7 Cir. (1944), 145 F. 2d 525, 526 10

United States v. Lanza, 2 Cir. (1936), 85 F. 2d 544, cert. den. 299 U.S. 609 17

United States v. Marachovsky, 7 Cir. (1953), 201 F. 2d 5, cert. den. 345 U.S. 965 10

United States v. Poppa, 7 Cir. (1951), 190 F. 2d 112, 114 10

United States v. Pruitt (1954), 121 F. Supp. 15, affirmed 217 F. 2d 648, cert. den. 349 U.S. 907 30

United States v. Reed, 2 Cir. (1938), 96 F. 2d 785, cert. den. 305 U.S. 612 13

United States v. Scoblick, 124 F. Supp. 881, 885, affirmed 217 F. 2d 727 18

STATUTE CITED.

Title 28, U. S. C., Sec. 1861, as amended September 9, 1957 9

TEXT CITED.

28 ALR 2d 972, 974 16

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 12099

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GRANT W. SMITH, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois. Honorable John P. Barnes, Judge Presiding.

APPELLEE'S BRIEF.

STATEMENT OF FACTS.

Inasmuch as the defendant has set forth a summary of the evidence, the Government will prsent no formal statement of facts, but will refer in its argument to *its* appendix and to the record, when necessary.

The defendant has understandably diluted some of the evidence in his statement. We reserve the right to invite the Court's attention to such portions of the appendix as will tend to sustain the Government's proof in this case.

We further reserve the right to dispute the conclusions and inferences drawn from the defendant's statement of facts in his argument, and will take specific issue with such conclusions and inferences in our ensuing argument, with appropriate reference to his points of the brief with which we cannot agree.

SUMMARY OF ARGUMENT.

I.

Not only has the defendant failed to sustain his burden of proof in his attack on the selection of jurors in the Northern District of Illinois but on the contrary, the evidence adduced indicates that jurors are selected in a fair and impartial manner from a wide and representative cross section of the people in the community. Special pains are taken by the Clerk to maintain the balance racially and geographically, and every economic, social, religious, racial, political and geographical group is represented.

II.

There is substantial evidence of the guilt of the defendant to support the jury verdict of guilty, and the Court which heard the evidence and observed the witnesses was convinced beyond a reasonable doubt that the finding of the jury was correct.

III.

Even though certain matters referred to by the prosecutor in his opening statement were not subsequently proved there was no bad faith present nor were the matters not proven clearly prejudicial. The matters not proved were called to the attention of the jury indirectly by the prosecutor and directly by counsel for defendant who admitted that the prosecutor had been fair.

IV.

The attempted recantation, obtained under suspicious circumstances, even if true, would not have affected the verdict of the jury and the statement given by the witness to counsel for defendant reiterated all the necessary elements to sustain the conviction.

CONTESTED ISSUES.

1. Whether the selection of 50 per cent of the array in the Northern District of Illinois by selecting names at random from telephone directories, and 50 per cent from lists furnished by Catholic, Protestant, Jewish and Negro churches, Labor Unions, Veterans Organizations, Parent Teacher Associations, Women's Clubs, Rotary's, Lions, Elks, Odd Fellows, Postmasters, Urban League, Y.M.C.A., St. Kilian Society, Catholic Parochial School, and names recommended by previous jurors and persons known to the Clerk, and volunteers, amounts to such systematic and intentional exclusion of certain economic, social, religious, racial, political or geographical groups as to deprive the defendant of a trial by jury as guaranteed to him by the Sixth Amendment to the constitution of the United States.

2. Whether the evidence against the defendant considered in the light most favorable to the Government supports the guilty verdict of the jury.

3. Whether the opening statement made by the United States Attorney containing matters which he stated he would prove, and did not, was so clearly prejudicial as to require a reversal of the jury finding of guilty.

4. Whether the Court erred in refusing to grant the defendant a new trial on the basis of a post trial affidavit made by the victim.

PROPOSITIONS OF LAW RELIED UPON.

I.

The Defendant Was Not Deprived Of A Jury Selected From A Truly Representative Group Of The Community As Guaranteed To Him By The Sixth Amendment To The Constitution Of The United States.

Glasser v. United States, 315 U. S. 60;
United States v. Brandt, 1955, 139 F. Supp. 349;
Thiel v. Southern Pacific Co., 328 U. S. 217;
Dow v. *Carnegie Illinois Steel Corp.*, 3 Cir., 1955, 224 F. 2d 414, cert. den. 350 U. S. 971;
People v. *Peterson*, 153 Ill. App. 480;
People v. *Madison County*, 125 Ill. 334;
Matsuo v. *Dulles*, 133 F. Supp. 711;
Barber v. *Yanish*, 9 Cir., 1952, 196 F. 2d 53, cert. den. 344 U. S. 817;
Title 28, U. S. C., Sec. 1861 as amended Sept. 9, 1957.

II.

Viewing The Evidence Against The Defendant In The Light Most Favorable To The Government, The Record Contains Substantial Proof To Support The Jury Verdict Of Guilty.

United States v. Marachovsky, 7 Cir., (1953), 201 F. 2d 5, cert. den., 345 U. S. 965;
United States v. Detente, 7 Cir., (1952), 199 F. 2d 286, 288;
United States v. Poppa, 7 Cir. (1951), 190 F. 2d 112, 114;
United States v. *Kadison*, 7 Cir. (1944), 145 F. 2d 525, 526;
United States v. *Chiarelli*, 7 Cir. (1951), 192 F. 2d 528, 531;

United States v. *Feinberg*, 7 Cir. (1941), 123 F. 2d 425;

McGuire v. *United States*, 8 Cir. (1945), 152 F. 2d 577, 580;

United States v. *Barton*, 2 Cir. (1943), 134 F. 2d 484, 485;

United States v. *Reed*, 2 Cir. (1938), 96 F. 2d 785, cert. den. 305 U. S. 612.

III.

A Conviction Will Not Be Reversed In The Absence Of Bad Faith Or Clear Prejudice Because The Prosecutor Refers In His Opening Statement To Matters Not Subsequently Proved.

Nichamin v. *United States*, 6 Cir. (1920), 263 F. 880, 882;

United States v. *Lanza*, 2 Cir. (1936), 85 F. 2d 544, cert. den. 299 U. S. 609;

United States v. *Scoblick*, 124 F. Supp. 881, 885; affirmed 217 F. 2d 727;

28 ALR 2d 972, 974.

IV.

The Court Did Not Err When It Refused To Grant Defendant A New Trial On The Basis Of A Post Trial Affidavit Given By A Government Witness.

Larrison v. United States, 7 Cir. (1928), 24 F. 2d 32;

Martin v. United States, 5 Cir. (1927), 17 F. 2d 973;

United States v. Pruitt, (1954) 121 F. Supp. 15, affirmed 217 F. 2d 648, cert. den. 349 U. S. 907;

Adams v. *United States*, 9 Cir. (1951), 191 F. 2d 206;

Apodaca v. *United States*, 10 Cir. (1951), 188 F. 2d 932.

ARGUMENT.

I.

The Defendant Was Not Deprived Of A Jury Selected From A Truly Representative Group Of The Community As Guaranteed To Him By The Sixth Amendment To The Constitution Of The United States.

The affidavit in support of a motion challenging the array was not admitted by the Government and the testimony disclosed that it contained half truths and conclusions not supported by the record.

Apparently the defendant has no objection to the selection of one-half the jurors by Commissioner Crooks who used the telephone directory. All of the names so selected, if not ineligible, are used to make up one-half the array.

An unbiased analysis of Clerk Johnson's testimony reveals a fair and impartial selection of the jurors to serve in the federal courts and an abstract of his testimony appears at pages 1a and 2a of the Appendix hereto and should be read in connection with this point.

Counsel complains that the Clerk of the Court failed to keep adequate records. Mr. Johnson was forced to testify without his records because counsel served upon him at about 10:15 A.M., June 10, 1957, a subpoena *duces tecum* requiring his presence in the court at 10:00 A. M., June 10.

A careful reading of the transcript reveals that the Clerk was unable to answer many of counsel's questions because he was not given sufficient time to gather his records and not because there were no records.

In the case of *Glasser* v. *United States*, 315 U. S. 60, a challenge to the array was overruled because of lack of proof in the record. The language favorable to appellant cited in his brief arose out of the peculiar circumstances of that case and the facts are easily distinguished. In the *Glasser* case all of the women on the jury were taken from a list furnished by *one* organization, The Illinois League of Women Voters, and they had attended jury classes whose lecturers presented the views of the prosecution. As now selected, 50 per cent of the jurors come from listings in the telephone directory and the other 50 per cent from many lists of many and various organizations the membership of which includes every economic, social, religious, racial, political and geographical group in the community.

In the case of *United States* v. *Brandt*, D.C. N.D. Ohio, E.D. (1955), 139 F. Supp. 349, the defendants attacked the selection of the jury on many grounds, among them that one juror had been recommended by the then District Attorney and also the sponsor system whereby the Clerk wrote to individuals and organizations for the names of prospective jurors.

As to the juror recommended by the District Attorney the Court said, at page 360:

> "The contention that one of the members of the indicting grand jury was disqualified because she was recommended for jury service by the then District Attorney, is without substance. The juror in question was fully competent to serve, and her recommendation by a Government official did not disqualify her. * * *"

In connection with the sponsor system the Court said, at page 360:

"Defendants' attack on the sponsor system as being invalid is unsupported by reason or authority. Jury officials have a wide discretion as to the manner and means of selecting names for jury service. *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201, 221. And it has been held specifically that the sponsor system is lawful. *Walker* v. *United States*, 8 Cir., 93 F. 2d 383."

In *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, persons who worked for a daily wage were intentionally and systematically excluded. There is certainly no evidence of a systematic and intentional exclusion of any group in this record.

In the case of *Dow* v. *Carnegie Illinois Steel Corporation*, 3 Cir. (1955), 224 F. 2d 414, cert. den. 76 S. Ct. 442, 350 U. S. 971, the Court discusses in great detail the selection of the jury and considers substantially all of the points raised by defendant herein. It was held that the method of selection there which is substantially the same as practiced in this District was proper.

It should be pointed out that there is absolutely no evidence in the record that any members of this particular array or this particular jury were volunteers. No objection was raised on this specific ground nor did the defendant exhaust his peremptory challenges. There is also no evidence that this defendant was in any way prejudiced because the jury may have had members that had volunteered.

The fact that a volunteer is not eligible for jury service under Illinois law creates a challenge for cause but in and of itself would not void the verdict of a jury.

The federal government has never considered itself unalterably bound by the qualifications set up by the State. In the *Thiel* case, *supra*, the Court said at page 221:

"A state law creating an unlawful qualification, however, is not binding and should not be utilized in selecting federal jurors."

It should also be pointed out that whether or not a person "volunteered" has nothing whatever to do with a person's qualifications to serve as a juror, but is an arbitrary matter.

In *People* v. *Peterson*, 153 Ill. App. 480, the Court held that an irregularity in the selection of jurors does not require the reversal of a judgment founded on their verdict unless it appears that defendant has been in some way prejudiced.

And in *People* v. *Madison County*, 125 Ill. 334, the Court held that even if it be assumed that the jury was obtained irregularly, a challenge to the array will not be sustained, where it is not also shown that a positive injury has been sustained in consequence of the refusal of the Court to quash the panel.

In any event the question of volunteers being or not being qualified jurors is now moot since the Congress of the United States expressed its opinion on this point this year when it repealed Section 1861 of Title 28, U. S. C., which section sets up the qualifications for federal jurors. The new Section 1861 eliminates paragraph 4 of the old Section which required that prospective jurors meet the qualifications for jury service set by the State in which the district court was sitting. This bill was signed by the President on September 9, 1957.

Since the manner of selection and the qualifications of jurors are procedural matters they are now governed by the new statute which eliminates the state qualifications. There is no vested right in procedure which makes it

immune to change by Congress. *Matsuo* v. *Dulles*, 133 F. Supp. 711; and *Barber* v. *Yanish*, 9 Cir., 1952, 196 F.2d 53, and cases cited in footnote.

Approximately 2,000 jurors are used each year and counsel complains that Clerk Johnson excludes from jury service the great majority of the population of the community. That must necessarily be true when the population is approximately 5,000,000. If we were to use every person in the community it would take 2,500 years before each person could serve, and the possibility exists that by that time many of the people would be dead.

The real test is whether the jurors selected represent a cross-section of the community from an economic, social, religious, racial, political and geographical standpoint, and this test is met.

II.

Viewing The Evidence Against The Defendant In The Light Most Favorable To The Government, The Record Contains Substantial Proof To Support The Jury Verdict Of Guilty.

This Court has held repeatedly that on appeal from a jury verdict of guilty, the evidence must be taken in the light most favorable to the Government, and it will neither weigh the evidence, nor consider questions of credibility, nor resolve conflicts in testimony. *United States* v. *Marachovsky*, 7 Cir., (1953) 201 F. 2d 5, cert. den., 345 U.S. 965; *United States* v. *Detente*, 7 Cir., (1952) 199 F. 2d 286, 288; *United States* v. *Poppa*, 7 Cir., (1951) 190 F. 2d 112, 114; *United States* v. *Kadison*, 7 Cir., (1944) 145 F. 2d 525, 526; *United States* v. *Chiarelli*, 7 Cir., (1951) 192 F. 2d 528, 531, and *United States* v. *Feinberg*, 7 Cir., (1941) 123 F. 2d 425.

The victim testified that she had a conversation with the defendant a week or two after they first met. "He (the defendant) talked of our relationship with each other. We—I decided to be his girl friend." (App. 3a) "He asked me who was my boy friend, and I told him I didn't have one. So that is how we got together." She said she was associated with the defendant as his "girl friend" for four or five months.

It is a matter of common knowledge and the jurors were no doubt aware of the fact that in the prostitute-panderer relationship the men and women involved do not refer to themselves as prostitute and pimp but as "girl friend" and "boy friend" or "man", and that the girl makes no move without the approval of her "man." This manifested itself prior to the first trip to Waynesville when the victim called the defendant on the phone and told him she would like to go to Waynesville, Mo., with Joanne.

He said it was *O.K.* with him if she wanted to go. Why should she even call the defendant for his O.K. unless he was her "man"?

She had no money and he told her to drop by his apartment. She did and he gave her $15.00 for train fare.

The victim testified she bought a train ticket with the money defendant gave her and went to Waynesville, Mo., near Ft. Leonard Wood and performed acts of prostitution from which she earned $219.00. When the victim returned after one night's work in Missouri she gave the defendant $195.00 of the $219.00 earned. The balance was no doubt spent for expenses on the trip and return fare.

In connection with the second trip to Waynesville the victim testified that "Well, he (the defendant) was talk-

ing about going back to Waynesville." (App. 3a and 4a) "Well, he just told me, at least we both were talking about it, going back down to Waynesville, because he said there wasn't any money in Chicago, and that was a nice time to go, and I didn't want to go by myself, and he said it would be all right for me to go by myself, and he give me money to go."

It will be noted that although the victim did not want to go by herself, she *did* go by herself when the defendant "suggested" she should go.

Members of the jury were also probably aware that the last of the month would be a "nice time" for any prostitute to visit an army town since the soldiers get paid at that time.

The victim took the $20.00 defendant gave her and bought a railroad ticket for St. Louis. She again went to the Cactus Club in Waynesville, Mo., and performed acts of prostitution from which she earned $175.00. She sent $100.00 of this to Smith by Western Union money order.

The defendant knew Jackson was going to Waynesville for prostitution on both occasions, paid for her transportation and confiscated her earnings.

In *McGuire* v. *United States*, 8 Cir., (1945) 152 F. 2d 577, at page 580, the Court said:

> "It was for the jury to decide whether appellant's actions aided or assisted in inducing the particular violations of the Act charged in the counts on which appellant was convicted."

The actions of this defendant not only aided and assisted in inducing the violation but without his "O.K." to

make the trip and the train fare he furnished there would have been no violation.

In the case of *United States* v. *Barton*, 2 Cir., (1943) 134 F. 2d 484, a White Slave Case involving inducement, Judges L. Hand, Augustus N. Hand and Frank, said, at page 485:

> "It is true that the girl herself vigorously denied that the accused had induced her to go, but the jury need not have accepted that, because from her testimony it appeared that it was her habit, when the accused called upon her, to entertain the customer selected for her, and to divide her earnings equally with the accused. The jury would have been justified in understanding from this that in such cases she would follow the directions of the accused, certainly to the extent of not going where the accused did not wish her to go. • • •"

It should be noted here that even when the victim attempted to recant her testimony by affidavit and by a statement made in the office of counsel for defendant after the trial, she reaffirms the prostitute-panderer relationship (page 6 of Statement given to Mr. Bellows on June 13, 1957) (App. 15a) "The money, I gave it to him. I gave it to him because I wanted to, not because he put any pressure on me, which he did not. He never asked me for any money. *I just gave it to him to take care of me.*" (Emphasis supplied)

To whom does a prostitute contribute her earnings so she may be taken care of?

In the case of *United States* v. *Reed*, 2 Cir., (1938) 96 F. 2d 785, the jury finding that the victim was induced to go from New York to Florida, by the defendant, was upheld even though the witness testified that she always wanted to go to Florida and paid her own way.

This is not a strange white slave case at all. It follows the usual pattern. There is no case until the victim has some reason to tell the truth about the illicit relationship. Here the defendant knocked the victim's eye out. She temporarily overcomes the emotion she designates as love and tells the truth to agents that visit her in the hospital. She repeats her story under oath to an Assistant United States Attorney and to the Grand Jury. When she recovers and the emotion of "love" for her "man" returns, she realizes he may go to jail. She comes under his spell and eludes police protection. When apprehended upon a material witness warrant and removed from the domination of the defendant she repeats her true story in court. Immediately after the trial, she is again dominated by her "man" and appears in his lawyer's office with him to try to save him from jail.

The only reason this defendant wanted her to stop prostitution was to become a shoplifter for him. It was more profitable (App. 5a).

F.B.I. Agent Parrish did not tell the witness that she had to testify against the defendant. He told her that if she did take the stand she should tell the truth and advised her that if she did not tell the truth she might be subject to possible perjury charges or possible contempt of Court.

Counsel now complains that the witness should not have been advised about perjury, but if this were a perjury trial he would complain that she was not advised of the possibility of such charge before testifying.

The testimony of the defendant would naturally exonerate him and did, but it is apparent from the verdict that the jury did not believe him.

The matter of the recantation will be dealt with in Point IV of this brief.

III.

A Conviction Will Not Be Reversed In The Absence Of Bad Faith Or Clear Prejudice Because The Prosecutor Refers In His Opening Statement To Matters Not Subsequently Proved.

When the victim was relating a conversation with the defendant and said she decided to be his girl friend, the question was asked as to what she meant. Defense counsel objected, but had the witness been permitted to explain the relationship and what she meant by becoming his girl friend she would have testified that she was to turn over her earnings for her keep. This relationship was manifest in the statement the victim gave to defendant's counsel after trial where she stated she gave the defendant money *"to take care of me."* (App. 15a) The prosecutor failed to make an offer of proof at this point.

There is certainly evidence in the record that the victim turned over her prostitution earnings to the defendant, $195.00 of $219.00 earned on the first trip and at least $100.00 of $175.00 earned on the second trip.

The victim testified that they were discussing going back to Waynesville because "he said there wasn't any money in Chicago" (App. 4a).

There was no evidence about a phone conversation with another girl because that girl (Bertha-"Pony Tail") was conveniently unavailable for service of subpoena. At the time of the opening statement the prosecutor still thought this witness would be found.

There was evidence in the record that the victim, in fact, stayed more than one day on the second trip and

was unable to work the second day because of police surveillance.

The prosecutor cautioned the jury in his closing argument that anything that he said which did not reflect their own recollection of what they remembered as coming from the witness stand was to be disregarded. (App. 12a).

The discrepancies between the prosecutor's opening statement and the proof as it ultimately developed was most competently pointed out to the jury by defendant's counsel in his closing argument (R 303-5).

The prosecutor was certainly not acting in bad faith when he presented his opening statement nor is there any clear prejudice shown. In fact, counsel for the defendant said in his closing argument (R 303) that the prosecutor "is a very fine gentleman, as he is fair. . . ."

The general rule is stated in 28 A.L.R. 2d 972, at page 974:

> "As a general rule, courts recognize the fact that proof frequently fails to come up to expectations, and so the tendency is to permit a prosecuting attorney a reasonable latitude in stating to the jury the facts proposed to be shown. And where no substantial prejudice results, and there is nothing to show that the prosecuting attorney acted in bad faith, the appellate court will usually refuse to reverse or to remand for a new trial because of a reference by the prosecuting attorney to matters which he subsequently made no attempt to prove."

In *Nichamin* v. *United States*, 6 Cir. (1920) 263 F. 880, the prosecutor failed to prove certain matters referred to in his opening statement. The Court said, at page 882:

> "The district attorney in his opening statement said that he would be able to show by the evidence

that these ingots were bought directly from the boys, that the age of the boys would indicate they could not honestly have possession of this character of property, and that the same was sold at a price that would indicate it was stolen. The evidence shows that the boys did not sell directly to the defendant but to a junk peddler, Schlaf, who in turn sold it to the defendant. While it is true that the evidence did not sustain these statements, the district attorney in making this statement was probably in good faith; at least, nothing appears to the contrary. He stated the facts as he expected to prove them. He failed to do this in some particulars. It is true that, if he had shown that this property was purchased directly from the boys and at a trifling price, it would have tended to prove guilty knowledge on the part of the defendant; but the failure of the district attorney to sustain his opening statements by the evidence could not be prejudicial to defendant but rather to the government. * * *"

In *U. S.* v. *Lanza*, 2 Cir., (1936) 85 F. 2d 544, certiorari denied 299 U. S. 609, the defendants claimed the prosecutor's opening statement was prejudicial because certain matters related were not proved. The Court said, at page 548:

"The prosecutor told the jury in an opening statement what the government expected to prove. It is now claimed that he overstepped the bounds of propriety in his zeal for conviction. No exception was taken to the statement when made, and there seems to have been adequate reason at the time for believing that it would be substantially borne out by the proof, as in fact it was for the most part. We think it fairly appears that the opening statement was made in good faith to inform the jury and the defense in a general way of the nature of the government's case, and that it did not go beyond this legitimate end."

In fact, the argument has been made that statements of the prosecutor not subsequently proved give the jury an unfavorable impression of the Government's case. For example see *United States* v. *Scoblick,* 124 F. Supp. 881, at page 885.

There is nothing in this record indicating bad faith on the part of the prosecutor nor does it show that his opening statement was clearly prejudicial.

IV.

The Court Did Not Err When It Refused To Grant Defendant A New Trial On The Basis Of A Post Trial Affidavit Given By A Government Witness.

In the case of *Larrison* v. *U. S.*, 7 Cir., (1928) 24 F. 2d 82, one of the principal witnesses for the Government recanted his testimony by subsequent affidavit. In discussing this the Court said, at page 87:

> "We shall approach this question on the assumption that a new trial should be granted when,
>
> "(a) The court is reasonably well satisfied that the testimony given by a material witness is false.
>
> "(b) That without it the jury *might* have reached a different conclusion.
>
> "(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

(a) Was the Court *reasonably* well satisfied that the testimony at the trial was false? Judge Barnes said: (App. 16a and 17a).

> "* * * This witness—what is her name?"

"By Mr. Connelly: Fay Jackson."

"By the Court: (Continuing)—Fay Jackson is unquestionably under the control of this defendant. The emotion she feels toward him she doubtless calls and characterizes as love, and she doubtless calls him her sweetheart. There isn't any question about it, she was and is a prostitute.

"I am satisfied that this defendant was living off her earnings, taking her earnings from her, and was not treating her very well at that.

"Undoubtedly she will say when she gets under his influence just exactly what he wants her to say. I have not got the slightest doubt about that.

"If I were not sure that the jury were right I would give him a new trial, but I am sure they were right. I am sure that he is living off the earnings of this woman, and I am sure that he induced her to change her story.

"I have never yet sentenced a man, fined him or sent him to jail or sent him to the penitentiary unless I was satisfied beyond all reasonable doubt that he was guilty, and that is what I feel about this man. If I did not feel that way I would not fine him, I would not sentence him, I would not put him on probation, I would not convict him. I am not going to change my mind about that either.

"I am satisfied beyond all reasonable doubt this defendant is guilty of the crime of which the jury found him guilty."

(b) Would the jury have reached a different conclusion? The only thing in the affidavit relating to the witness's testimony is contained in paragraph 7 thereof, as follows: (R 359, 360)

"'I made statements against Grant that were not true in that I told the court that Grant had sent me

> to Rockford for prostitution and that he had given me money to go to Detroit to see my children, but actually I didn't go to Detroit, instead I went to Waynesville, Missouri. Grant did give me money on two occasions to go see my children at the end of January and February of this year.' "

Even if we concede that she meant to say Waynesville instead of Rockford and that the defendant did not "send" her, what do we have? A conclusion by the affiant that she was not "sent". And what does she mean by being "sent"? On page 8 of the statement taken by Mr. Bellows from the witness in his office, this appears: (App. 14a)

> " 'Q. Well, did he send you there?"
>
> " 'A. Well, I got money from him to go there, but he did not send me there, he did not take me to the station and buy a train ticket and put me on the train. Wouldn't you say that was sending me if he took me to the train and bought me a ticket? He did not do that, so I would not say he sent me.' "

The statement is set out in full in the margin.[1]

---

[1] Statement of Faye Jackson, taken in Suite 123, 10 South LaSalle Street, Chicago, Illinois, at approximately two o'clock, June 13, 1957, upon interrogatories propounded by Charles A. Bellows.

Statement reported by James F. Finn for Lenore Weiss.

* * *

Mr. Bellows: Come in, Faye Jackson. You came in here with Mr. Smith?

Miss Jackson: Yes.

Mr. Bellows: Is there anything particularly you want to see me about?

Miss Jackson: Well, I want to see if we can do something about helping him.

Mr. Bellows: Q. Who?

A. Mr. Smith.

Q. How do you intend to help him?

A. Well, I wanted to see if we could get all this here off, you know, at this time, find him guilty in a case of—the testimony I gave in court the other day, I want to change it.

[1] (Continued)

Q. You mean you have come in to tell me you want to change your testimony?

A. Yes.

Q. Did you testify falsely when you testified against Mr. Smith? Did you testify truthfully against Mr. Smith?

A. Part of it falsely, part of it truthfully.

Q. Which part was false and which part was true?

A. Well, he did not send me down to Missouri. I asked him, I said I wanted to go. I said, "I do not have any money." I wanted to get some money from him. I said he sent me, but he did not send me. It was me going. I went.

Q. What about the rest of your testimony? Was that true or false?

Miss Jackson: About what?

Q. About giving him $195 after you returned—

Miss Jackson: I did.

Q. —From Waynesville, Missouri? That is, the first time.

A. I did.

Q. I want you to do the talking.

A. I did.

Q. And you sent him $100, also?

A. It was for a reason. I sent it to him so he could send it to my kids. ~~Smith said it was to repay loan.~~

Q. Now, you have made a statements to the contrary, have you not, to the Federal Bureau of Investigation?

A. True. A lot of it they were telling me to say mostly.

Q. What did anyone tell you to say?

A. He told me, he said, when they came to see me in the hospital, I did not send for any Federal policemen. They came to see me in the County Hospital and told me they had money orders which I had sent him. They told me, they said, they had their eye on Mr. Smith for a long time, and that there was nothing I could do. If I got up on the stand and lied, he said, to help him, he said, that I would get some time, and I asked him for what reason is there for me to lie. He said, "But it is not fair. If somebody tried to knock your eye out, wouldn't you do whatever you could to see he was punished for it?" I said, "I do not want to punish him." I said, "I do not want the police." I said, "Anything I have against him, I will give him myself if it takes the rest of my life." They kept coming back and pestering me in the hospital.

Q. When, if at any time, did you make the statement that Mr. Smith sent you to Waynesville, Missouri?

A. When he showed me the telegram.

(Continued)

Q. What did you say?

A. He asked me, "Isn't this you? Your name is on there, Faye Jackson?" I knew I could not lie because it had my handwriting there showing I did send the money so I said, "Yes," but I did not tell them I sent it to him, but I sent it to my kids. I was angry at Mr. Smith at the time. I told them a lot of things but so they would let me alone.

Q. The first time you talked to anybody from the Federal Bureau of Investigation was at the County Hospital?

A. It was.

Q. How many times were you visited by men from the Federal Bureau of Investigation at the County Hospital.

A. Oh, about 6 or 7 times.

Q. Well, in which conversation during those five or six times did you tell any man from the Federal Bureau of Investigation that Mr. Smith sent you to Waynesville, Missouri?

A. After he showed me the telegram.

Q. Did the men from the Federal Bureau of Investigation show you the telegram the first time?

A. No; they talked to me the first time.

Q. Which visit was it that they showed you the telegram?

A. Before we went to the grand jury hearing.

Q. Were you still in the County Hospital?

A. I was.

Q. How many times had they seen you previously?

A. About two or three times. There was a lot of them come to see me. Sometimes I would know who they were. There was policemen there all the time coming in and see me, asking me about him, and questioning me. They wanted me to name the other girls and things he had. I told him I did not know anything about any other girls.

Q. When was it, at the County Hospital, if you ever did, that you told the men from the Federal Bureau or Investigation that Mr. Smith sent you to Waynesville, Missouri?

A. That was after he showed me the telegram.

Q. Did you say that to them?

A. Yes; I did.

Q. Was that true or false?

A. Well, he did not send me. I was going anyway, but I did not have any money to go. I got the money from him to go. He did not send me.

Q. Do you mean you had made up your mind you were going?

A. Yes.

(Continued)

Q. To Waynesville, Missouri?

A. Yes.

Q. No matter what Mr. Smith said?

A. Well, I did not think he would stop me from going if I wanted to go. He did not try to tell me what to do and what not to do. He let me do what I wanted.

Q. When you called him up, was that for the purpose of asking for permission to go to Missouri?

A. Asking for money to go.

Q. Was that the only purpose of your call to him?

A. Yes.

Q. Why did you give a different impression when you testified or intend to give a different impression when you testified in court against him?

A. They had me all frightened. They told me I am on probation in Detroit. They said they were going to see I got some time out of it. I told them up at County, after they arrested me and took me to Rockford, the Rockford County jail, I said I would not testify against Mr. Smith. I said what I was doing, I was doing it before I even knew him. He did not entice me into anything. What I did was because I wanted to do it. The money, I gave it to him, I gave it to him because I wanted to, not because he put any pressure on me, which he did not. He never asked me for any money. I just gave it to him to take care of me. I was frightened. That was the reason why. I thought I probably would get some time out of it. I had two people to see me. They said I would get time from it, probation. I was out of town. I was frightened. Anything I could do to keep from going into the penitentiary, I would do it, but I said that was not the right way.

Q. Who frightened you?

A. Mr. Parrish was one.

Q. Who?

A. He did all the talking, and Mr. Conley, he tried to tell me, "We are not threatening you." He said, "Do not get the impression we are threatening you, but it could happen to you."

Q. What?

A. I would do some time if I got up and said—to find out I was prostituting for Mr. Smith.

Q. Did you ever tell Mr. Parrish or Mr. Conley anything contrary to what you have testified to? By that I mean, did you ever tell them that Mr. Smith did not send you to Waynesville, Missouri?

A. Yes; I did.

(Continued)

Q. When did you tell them that?

A. I told them that in court, the grand jury hearing, at the first hearing we went to. I told them that.

Q. When you went before the grand jury, you testified there that Mr. Smith did not send you to Waynesville, Missouri?

A. No. I told them I was going with some girls, some girls I was talking to that was going. They asked me to go along. I said, "Sure, but I do not have the money." I said, "I have to get some money," so I called Mr. Smith.

Q. Did you testify before the grand jury to the effect that you had to ask him for permission to go to Waynesville, Missouri?

A. I told them I called him, and they asked me, did he give me permission to go. I said, "No." I said, "I called to get some money to go." I did not have any money. That is what I said. He asked me. I told them. He asked me who was I going with. I told them, and that is all.

Q. Now, in reference to the second time you went to Waynesville, Missouri, did you have a conversation with Mr. Smith before you went there?

A. Yes.

Q. What was the conversation at that time?

A. I told them I was going back down there, I said, because I feel like I can make more money down there than I can here. He said, "Do what you want to do."

Q. Well, did he send you there?

A. Well, I got money from him to go there, but he did not send me there He did not take me to the station and buy me a train ticket and put me on the train. Wouldn't you say that was sending me if he took me to the train and bought me a ticket? He did not do that so I would not say he sent me.

Q. Was there any conversation to the effect that you could make more money down in Waynesville, Missouri?

A. I told him that. I knew I could. I did the first time there. I made more money than I was making in Chicago. I wanted to go.

Q. Were you in any way persuaded or enticed or induced?

A. No.

Q. Or coerced to go there?

A. No. That was why I want to do all I can to help him because he did not entice me to do anything I was not already doing.

(Continued)

Q. Well, from what you have told me just now, it would seem to me that part of the testimony that you gave against Mr. Smith was not correct?

A. That is right. It is not correct where I said he sent me there, that he told me to go there. He did not tell me to go there.

Q. Do you know, if you were to testify now that you lied on the witness stand, you would be in trouble? Do you know that?

A. I probably would, but wouldn't it be a way—the reason way—to tell a lie, I was trying to help myself, I mean, like telling them he sent me down there. Well, he did not send me down there, so the reason why I said he did, they said they knew he did send me because I sent my money back to him, and they had a witness to prove he sent me, that went with me to get the money to go. They told me about the witness.

Q. The point I want to make clear is, if you came back to court and testified the way you just testified to me—

Miss Jackson: I would be in trouble.

Q. You might be in trouble because you lied on the witness stand against Mr. Smith?

A. That is another thing to think about. Wouldn't there be a way I could have a lawyer to help me in that defense?

Q. Well, I am not concerned about that. I am concerned about whether or not you are telling me the truth or whether you told the court and jury the truth?

A. Yes.

A. Well, the things I said were the truth. The only thing I said that was not true was that he sent me to Waynesville. I think that was all the whole case was built upon.

Q. You say the statement you gave to the court was not true?

A. That he sent me; yes.

Q. Is that right?

A. Yes.

Q. Other than that, you testified truthfully?

A. Yes.

Q. Are you willing to come into court and repeat what you have told me even though it might mean you might get in trouble?

A. Well, I will tell you, before I would say that, I would have to see about getting me an attorney to advise me. I would like to help him if I could, but I mean, there are a lot of things I could not just write off and forget what happened to me on account of him. I lost an eye behind

[1] (Continued)

him, and I do not know, where I would rather go to jail and see him free. I do know how I would feel about it, to say I would go to court and testify for him.

Q. If I were to call you as a witness, would you repeat the same things that you told me?

A. Not if I feel like I am going to get into trouble. I think that there is nothing they could do to me if I felt like I wanted to change my testimony so he would not be in trouble.

Q. You cannot commit perjury. You cannot lie in court. I do not want you to. Is your statement that you have given to me that Mr. Smith did not send you there the truth?

A. That is the truth.

Q. That is the truth?

A. Yes.

Q. Would you repeat that to the Court?

A. I would rather talk to a lawyer for myself, my defense, before I would say. I probably would keep the same story if I felt like I was going into the penitentiary and if I had a lot to lose.

Q. What do you mean? I do not understand.

Miss Jackson: What I mean?

Q. I did not understand the last statement you made.

A. Well, I did not send for any FBI man. They bring up I was prostituting for Mr. Smith, but it happened like it did. I lost an eye. I was very angry with him. Anything I felt I could do to hurt him, I would do. Then I felt different afterwards, after I felt better and thought it over. I felt better, but they frightened me up, the fact that I was going to get a whole lot of time, anyway, on the probation. They said if I would go up there and testify that he sent me, they did not exactly put it in those words, but there was the menace there, they said they would see if they could help me. In other words, they are talking, but they are telling me I might get in some trouble. I do not want to get in any more trouble than I can probably help, so I think it would be much better for me to see a lawyer for myself and then come back and talk to you and maybe I can talk to you a little bit better than I can now.

Mr. Bellows: That is perfectly all right with me.

Miss Jackson: I think that would be the best thing for me to do.

Q. Where do you live now?

A. 643 West 61st.

Q. With whom do you live?

A. My father and mother.

[1] (Continued)

Q. Are you willing to swear what you said to me was the truth?

A. I just told you that I would rather see my lawyer first before I swear to anything.

Q. Has anyone asked you to come in and see me for the purpose of changing your story?

A. No. I called Mr. Smith myself and told him I wanted to see if there was anything I could do. I had not got a chance to talk to him before. I do not believe that, whatever did happen to me, it was really intended.

Q. Did you tell the truth when you were asked in court whether or not you had called him the night you testified to?

A. I did not call him that night.

Q. You did not call him that night?

A. No.

Q. Did you call anyone to convey a message to Mr. Smith that you were sorry you testified and you did it because you were afraid?

A. I do not think that was what I said. I called a friend of mine and Mr. Smith's and I told him, I said that these people were trying to tell me I was going to get some time in Detroit if I violate my probation. They told me how much I was going to get, and I said, "I am awfully sorry I had to testify against him." That is what I said.

Q. Who did you call?

A. I called Mr. Stepto, but he was not there. I think I talked to Mr. Smith's step father. I called yesterday, not last night, yesterday morning, I called Mr. Brown and talked to him about it.

Q. Who is Mr. Brown?

A. Before saying anything else, I think I would rather see my lawyer about it. I do not know if am hurting myself. I do not want to do that.

Q. You voluntarily called him yourself?

A. I did.

Q. And you voluntarily told him you wanted to come in and make a statement correcting your testimony? Is that what you told him?

A. Yes. That is, if it would help; yes.

Q. I still would like to know—

Miss Jackson: I would not want to say anything else. I will talk to my lawyer and come back and see you. I do not know. I cannot seem to get together with you to understand this trouble.

Q. I have advised you definitely that, if you change your testimony in court, you could be punished?

The Government submits that this is not the test on the question of inducement. In the statement given to Mr. Bellows the witness says that everything else she testified to at the trial was true except the defendant did not "send" her. He knew she was a prostitute, he knew she was going to Waynesville and O.K.'d it the first time and ordered it the second time; he furnished her with money to buy her railroad ticket, and he confiscated her earnings.

Even if what the victim said in her affidavit were true, the jury would have reached the same conclusion.

(c) Was the defendant taken by surprise? Counsel for the defendant had interviewed the witness at the Rockford jail before trial and knew exactly what her testimony would be.

Interesting language appears further on in the *Larrison* case at page 88, where the Court cites *People* v. *Shilitano*:

---

[1] (Continued)

A. I know that.

Q. You could be punished for perjury or for contempt, and I warned you of that because you are telling me that you did not testify correctly in the first instance.

A. Well, I think, before I say anything else, just like I said, I would rather talk to my attorney, also. I have nothing else to say.

Q. If you were called into court—

Miss Jackson: I do not know whether I would testify like that or not. I am not going to say because I thought maybe I could help Mr. Smith out if I come in and we tried to see if we could get together on something to help him, but to destroy myself, no.

Q. Would you be willing—

Miss Jackson: I am saying I will not say anything more until I talk to my lawyer. I will not say I am willing to do anything. I will tell my lawyer just what I told you.

Q. Who is your lawyer?

A. I have talked to two or three lawyers now. I do not know exactly which one I will talk to. I will let him let you know who he is.

Mr. Bellows: O. K.

• • •

" 'Bearing in mind that the witnesses to crimes of violence are often of a low and degraded character and that after they have given their testimony they are sometimes influenced by bribery and other improper considerations, it is evident that the establishment of a rule which left the power to grant a new trial to a defendant to depend upon recantation by such witnesses would be subversive of the proper administration of justice. I do not wish to be understood as urging that the fact of recantation is not to be considered by the court in weighing the testimony upon which the defendant was convicted, but I wish to make clear the fact that recantation in and of itself does not necessarily require the court to order a new trial. Such being the case, whether or not a new trial should be granted must depend upon all the circumstances of the case, including the testimony of the witnesses for the people, submitted on the motion for a new trial, in which these witnesses recant the testimony which they gave upon the trial.'

"Speaking of the duty of the court where defendants have offered the sworn recantation statement of a witness for the prosecution the court says:

" 'But if, on the contrary, he (the judge) was convinced that the second testimony was false, that a criminal league had been formed to set at naught the verdict of the jury and the judgment of the court, his duty was clearly marked. He was not at liberty to shift upon the shoulders of another jury his own responsibility. That would have been to make the conspiracy triumphant. He was charged with the responsibility to seek the truth himself.' "

In the case of *Martin* v. *United States*, 5 Cir. (1927) 17 F. 2d 973, cited by defendant, the verdict was affirmed and the Court warned of suspicious circumstances surrounding the execution of such affidavits.

Note the circumstances here. The defendant knocks out the eye of the witness in a fight in Washington Park. The

following day she tells her story to the F.B.I. A couple of weeks later, before being contacted again by the defendant she tells substantially the same story to the United States Attorney and under oath to the Grand Jury. She repeats her story, again under oath, before the jury. Two days after the verdict she appears in the office of defendant's lawyer *in the company of the defendant* and says she wants to change her story. But she wants to change it in only one regard. Isn't it strange that it has to do with the question of inducement?

Even if the motion were sufficient, new trials are granted only with great caution, *U. S.* v. *Pruitt*, (1954) 121 F. Supp. 15, affirmed 217 F. 2d 648, and a motion for a new trial is addressed to the sound discretion of the trial court, *Adams* v. *U. S.*, 9 Cir. (1951) 191 F. 2d 206, and will be reviewed only where there is a clear abuse of discretion. *Apodaca* v. *U. S.*, 10 Cir. (1951) 188 F. 2d 932.

CONCLUSION.

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the judgment and conviction of the defendant, Grant W. Smith, should be affirmed.

Respectfully submitted,

R. Tieken
United States Attorney

John Peter Lulinski
Assistant United States Attorney

D. Arthur Connelly
Assistant United States Attorney
Of Counsel.

INDEX TO APPENDIX

	PAGE
Testimony of Clerk Johnson	1a
Testimony on Behalf of Prosecution	2a
Testimony of Mae Francis Norwood	2a
Testimony of Frances Shipp and Joanne Bigham	5a
Testimony of Geneva Washington	6a
Testimony of Frances Hamilton	7a
Testimony of Thomas W. Parrish	8a, 15a
Testimony for Defendant	10a
Testimony of Grant Smith	11a
Motions	12a
Colloquy	13a
Certificate of Clerk	17a

APPENDIX.

TESTIMONY OF CLERK JOHNSON ON CHALLENGE TO THE ARRAY

To obtain names for the one half the jurors selected by Clerk Johnson, he wrote for lists of prospective jurors to Catholic, Jewish and Protestant churches (R 27); Negro churches (R 24 & 25); Labor Unions, Veterans organizations, Parent Teacher Associations, Women's Clubs, Rotarys, Lions, Elks, and Odd Fellows (R 28); Postmasters (R 24 & 23); Urban League (R 29); Y.M.C.A. (R 25); St. Kilian Society (R 48) Catholic Parochial School (R 49); and used names recommended by previous jurors (R 37), volunteers and names recommended by people the Clerk knew. (R 43)

The Clerk always has a surplus of questionnaires (R 40). Those which are placed in the wheel are balanced so that 50 per cent of the names are supplied by Commissioner Crooks and 50 per cent by Clerk Johnson. (R 40) A geographical balance is also maintained. (R 29, 40)

From the lists of questionnaires on hand those to be placed in the wheel are selected in different ways. They are sometimes selected alphabetically, sometimes by the latest date on the questionnaire and sometimes by selecting every 5th or 20th questionnaire. (R 41) No effort is made to break Chicago down on a neighborhood basis but the rest of the county is given representation by selecting one or two jurors from each different town. (R 41)

Clerk Johnson testified that he had envelopes *full* of *lists* from which the names of prospective jurors are drawn. (R 43)

To the best of his recollection, several thousand questionnaires were returned to the Clerk in 1956. (R 44)

The Clerk testified that the figure of 50-60 per cent of his one-half of the names added in 1956 which was made up of volunteers, and people recommended by former jurors or friends was purely guesswork. (R 51)

On January 1, 1957, Clerk Johnson had a large supply of questionnaires on hand (R 26) but was short of the names of Negroes so he wrote to Negro churches and organizations so that he could maintain the racial balance.

The Clerk watches the wheel closely to prevent an accumulation of old names. A recent check revealed that 90 per cent of the names in the wheel were questionnaires from 1955, 1956 and 1957; there were two from 1952 and a few from 1953 and 1954. (R 55)

When questionnaires are placed in the wheel there is no indication from which list the name was taken (R 61) and no class is excluded because of religion, race, wealth, education (R 29) or for social, political or geographical reasons. (R 66A)

In the time Mr. Johnson has been selecting jurors since 1942 he can recall only three whose names were submitted to him by employees of the United States Attorney. (R 63)

TESTIMONY INTRODUCED ON BEHALF OF PROSECUTION

Mae Francis Norwood testified that she is also
98 known as Faye Jackson and Louise Young, that she was a prostitute and had been convicted of possession
99 of marijuana and served 30 days in jail and was placed on probation for 2 years. She testified that she was not a narcotic addict and never had been.

She met the defendant several months prior to the trial at the Pershing Hotel. They had a conversation and found out who each other were.

A week or two later they had another conversation. The defendant talked of their "relationship" with each other. He asked who her "boy friend" was and she said she had none. That is how they got together and she decided to be his "girl friend." Norwood testified she was defendant's "girl friend" 4 or 5 months.

On or about January 30, Norwood took a trip to Waynesville, Mo. Some girl friends were going and asked her to go along. They were in a restaurant at the time and she telephoned the defendant. She told him she wanted to go to Missouri with her girl friend Joanne. He said it was O.K. with him if she wanted to go. She told defendant she didn't have any money to go and he told her to come by the house and get some. She went to his apartment and he gave her $15. (R 110)

The witness and two women known as Joanne and Bertha boarded an I. C. train at 63rd St. Station in Chicago, Illinois, and went to St. Louis, Mo. The girls took a bus to Waynesville and a taxi from Waynesville to the Cactus Club. (R 111) That night the witness committed acts of prostitution from which she earned $219.00. She returned to Chicago the next day and gave defendant $195.00 of this money. (R 113)

On or about February 27, 1957 the witness and defendant had another conversation about going to Waynesville, as follows: "Well, he just told me, at least we both were talking about it, going back down to Waynesville, because he said there wasn't any

money in Chicago, and that was a nice time to go, and I didn't want to go by myself, and he said it would be all right for me to go by myself, and he give me money to go."

Defendant gave the witness $20.00. She purchased a ticket at the 63rd St. Station and took an I. C. train to St. Louis, arriving the following morning. She met Bertha and another girl at the Bus depot but they missed the bus and friends of Bertha drove them to the Cactus Club in Waynesville. (R. 116) The witness met two girls she knew at the Club, one named Frances and one named Jackie. The witness committed
117 acts of prostitution from which she earned $175.00. She returned to St. Louis and called the defendant,
119 telling him she was sending money home. She sent $100 by Western Union money order. (R 120) The witness went to the Midland Hotel in St. Louis from the train station. After 3 or 4 hours, she and 4 other girls took a taxi back to Waynesville. The police were around so the witness returned to St. Louis and took an I.C. train to Chicago. She had a conversation with defendant upon her return and they talked about "things wasn't as nice as before when
124 I went."

On cross-examination, Norwood testified that her felony conviction was in Detroit. She stated that she never borrowed any money from the defendant to go to Detroit but that she had asked him for money to
129 go. She met the defendant at the Pershing Hotel. She never saw him working as a bartender and
132 thought he owned the place. She had been drinking when she met the defendant. The witness talked to Mr. Connelly, the Assistant U. S. Attorney, two or three times, the first time in March 1957. Her

134 testimony was the same as when she talked to Connelly the first time, with maybe a few changes. (R 135)

Connelly talked to the witness at the Rockford
137 County Jail the next time she talked to him. Mr. Connelly told her to tell the truth. (R 138) The witness testified that defendant asked her to stop
150 prostituting because he wanted her to learn to shop-
151 lift. She said she did not know how to shoplift, that all she knew was prostituting. Both the witness and defendant had been drinking at the Pershing lounge.
156 From there the witness testified they went to "The apartment he had for me." The defendant wanted the witness to work as a shoplifter (R 158) and said he didn't like a prostitute. The witness was mad at the defendant who threw a bottle at her and caused
159 five stitches in her face.

Frances Mae Shipp testified that she was a pros-
162 titute and met Faye Jackson (Norwood) at the Cactus Club in Waynesville, Mo., on February 28, 1957. (R. 163) The witness returned to St. Louis by Greyhound bus with Faye Jackson, who sent a Western
164 Union money order. She saw her give a lot of bills to the Western Union clerk. (R. 166) She and four girls, including Faye Jackson, missed the bus back to Waynesville the next day and they took a cab.
169 The driver charged $5.00 apiece for the trip.

175 Joanne Bigham testified she was a prostitute and had been convicted for receiving stolen property (R. 176) and did not know the defendant personally. On January 30, the witness met Jackson and "Pony Tail" at the Clover Club at 63rd and Cottage. She saw

Faye Jackson make a phone call about 8:00 P.M.,
178 and then she and Jackson took a cab to 51st and Ellis. The witness waited in the cab while Jackson went into the building at 5100 Ellis Avenue. Jack-
179 son came out in about 10 minutes. After stopping at the Pershing Lounge they boarded an I. C. train
181 at 63rd Street to go to St. Louis, Mo. The witness, Jackson and Pony Tail took a bus to Waynesville, Mo., and a taxi from the bus station to the Cactus Club and committed acts of prostitution. She re-
185 turned to the home of Pony Tail's mother the next morning and returned to Chicago in the afternoon via the I. C. R. R. On February 28, 1957, the witness returned to St. Louis with Frances Shipp, Frances Hamilton and Jackie Phillips (R. 187). They checked their luggage at the Railroad Station and took a bus to Waynesville. She met Faye Jackson either at the
189 bus station or the Cactus Club and performed acts of prostitution. When they returned to the Railroad Station in St. Louis, she saw Faye Jackson go to the
192 telegraph counter. She stayed in a room at the Midtown Hotel that day with Faye Jackson and Jackie Phillips. She and Faye Jackson, Jackie Phillips, Frances Shipp and Frances Hamilton returned to the Cactus Club the night of March 1, by taxi, paying the driver $5.00 apiece. They returned to St. Louis by the same cab and returned to Chicago on the
193 I. C.

Geneva Washington, also known as Jackie Phlilips, testified she was a prostitute and met Faye Jackson in Detroit a number of years ago. On February 27, 1957, she took the I. C. train to St. Louis. On the train she met Joanne, Frances Shipp and Frances

Hamilton. She met Faye Jackson, also known as
201 Louise Young, at the railroad station in St. Louis. They took a bus to Waynesville and taxi to the Cactus Club. After work that night she returned to St. Louis and saw Faye Jackson fill out an applica-
204 tion for Western Union money order for $100.00. That afternoon they returned to Waynesville by cab,
206 the driver charging each girl $5.00. She returned to St. Louis by cab and took the I. C. train back to Chicago (R. 208). She testified she had been convicted of shoplifting.

By stipulation it was agreed that Western Union Money Order # J T 72338, for $100.00, dated March 1, 1957, was telegraphed from St. Louis, Mo., and was received by, endorsed by and deposited by the
214 defendant. Grant Smith, who received the money.
217 The money order was received in evidence as Government's Exhibit 2.

It was stipulated that the I. C. Railroad was a
218 common carrier.

Frances Hamilton, also known as Holladay, testified that she is a prostitute; that she met Faye Jackson on March 1, 1957, on a Greyhound bus going from
220 Waynesville, Mo., to St. Louis and that Jackie Phillips and Frances Shipp were on the bus. She testified that when they arrived in St. Louis she saw Faye Jackson write out an application for a money order
221 and hand the clerk several bills. She testified that she returned to Waynesville by taxi, paying $5.00 each for the fare; she engaged in prostitution at the Club, then returned to St. Louis where she boarded
225 an I. C. train for Chicago.

Thomas W. Parrish testified that he was a Special Agent of the Federal Bureau of Investigation and had investigated the defendant; that defendant lived at 5100 S. Ellis Avenue, Chicago, and there was no other Grant Smith listed at that address. He testi-
226 fied that he took the defendant into custody. He testified that defendant denied knowing anyone by the
230 name of Jackson or Louise Young. Frances Norwood, also known as Faye Jackson or Louise Young, was recalled for further cross-examination.

She testified she did not call the defendant on the phone after the court the previous day. The witness
234 was not aware that an order of discharge had been entered the previous day; she testified she went home after court adjourned. She testified she was arrested because she did not let them know where she was (R. 236). She said Mr. Parrish told her if she didn't testify against the defendant she would be in contempt of court, or something, or perjury, or something. She thought if she did not testify she might go to jail. She said the thought of going to jail for five years frightened her.

Thomas W. Parrish was recalled as a witness by the Government. He testified that he did not tell Miss Jackson that she would be put in jail for five years for perjury if she refused to testify against
238 the defendant and that he did not tell her she would be put in jail at all for any period of time if she refused to testify.

On cross-examination Mr. Parrish testified that he never told Mrs. Norwood that she would be held in contempt of court if she didn't testify. He did not
239 tell her what the effect would be of her refusing to testify against Mr. Smith. He did not write down all

the things that were said between himself and Mrs. Norwood and had never spoken to her alone. There were various agents present at different times. Agent Boner was with him when he first spoke to Miss Jack-
240 son at the County Hospital. Agent Boner was with him the second time he talked to Jackson in the vestibule of the U. S. Attorney's office. The next time he talked to the witness on April 20, at the Manor House Hotel in Chicago (R. 241), in the presence of Agent Don Peterson. The next time he spoke with the witness was at Rockford, Illinois. Jackson had
242 told him she didn't want to appear in court. He told the witness that if she did appear in court and did not tell the truth, she could possibly be held for perjury. Mr. Parrish did not tell Miss Jackson what would happen if she did not testify at all.

On redirect Mr. Parrish said that he told Miss Jackson that if she took the stand she should tell the truth regarding her association with the defendant, because if she did not tell the truth, she would be subject to possible perjury charges and possible
244 contempt of court.

The Government rested its case.

Motion for judgment of acquittal was made.

246 By Mr. Bellows: "My impression is, your Honor, from carefully reading the testimony in this case, that there just isn't sufficient to prove beyond all reasonable doubt that he is guilty of this offense."

By the Court: "I think he is. I think there is sufficient evidence to show he is guilty of it. If you weren't moved by the enthusiasm of your position, you probably would think so."

The motion was denied.

Testimony for Defendant.

247 Grant Smith testified that he lived at 5100 S. Ellis Avenue, Chicago, Illinois; was 39 years old; was born in Montgomery, Ala., and finished the 9th grade. He worked as a delivery boy, came to Chicago in 1937, and worked as a laborer, elevator operator and bartender; that he presently manages a tavern and formerly owned one. He said he met Mrs. Norwood in December 1956, at the Pershing Lounge. He met her again three weeks later at the same place and she told him she lived in Detroit, had been married and had a couple of kids, and was going to modeling
250 school. He said he did not know she was a prostitute. When he saw her the second time she said she had been in trouble in Detroit and had to report each month for probation. She missed one month report-
252 ing for probation. She asked him for $150 to straighten out her probation (R. 253). He gave her $100 on about January 27, and saw her again about 12-14 days later. Defendant said he didn't know that Mrs. Norwood had gone to Waynesville, Mo., but told him she was going to Detroit. She called him and said she was out of town and was going to send him
255 money. He did know the money order came from Waynesville. He said he surrendered to the Federal Bureau of Investigation.

257 Smith denied receiving $195 from Mrs. Norwood. He quarrelled with her in March and denied he told her to go to Waynesville. He learned in March that
258 Mrs. Norwood was a prostitute. Smith said he talked to Mrs. Norwood about her being a prostitute about three days later in the Pershing Lounge. Mrs. Norwood first denied she was a prostitute, but after some
261 drinks, while at her house she admitted it. He said

he didn't like prostitutes and she threw a glass of whiskey at him. He threw the bottle at her which struck her. He said she was mad and told him she would get even. Smith said he did not see her after
261 that until he saw her in Court. Smith said that Mrs. Norwood called him the night before he took the stand and said she was sorry she testified against
262 him but she would get five years if she didn't testify.

Smith testified that he surrendered to the F.B.I. and they told him he was under arrest for sending Faye Jackson or Louise Young to Waynesville. He said he did not know Mrs. Norwood by either name and denied sending anybody any place. He denied that he ever persuaded, enticed, induced or coerced
263 Mrs. Norwood to go to Missouri for the purpose of engaging in prostitution.

On cross-examination Smith said he lived with his mother at 5100 S. Ellis Avenue and was employed as manager of the Pershing Lounge on a salary basis.
264 He said he did not notice that the Western Union money order, Government's Exhibit 2, stated thereon that it was "Telegraphed from St. Louis, Mo." He said he took it for granted it was from Michigan, because he thought she was going there. He said the long distance operator did not talk to him when he received the call from Missouri (R. 265). He said when he picked up the phone he talked directly to Mrs. Norwood and he did not remember if someone said "This is a long distance call" or "Will you accept a call from St. Louis."

He said he did not know if the scratch Norwood
267 received from the thrown bottle required any stitches. He said his mother, stepfather, a nephew and roomer

lived with him in an 8-room apartment at 5100 Ellis. He said there had been other roomers at times and had no other occupation than that of manager of the Pershing Lounge.

270 The defendant rested his case.

Motion for judgment of acquittal at the conclusion
271 of all the evidence was denied.

275 The prosecutor cautioned the jury that anything he said which did not reflect their own recollection as coming from the witness stand was to be disregarded.

330-338 Charge of the Court.

Thereafter the jury returned the following verdict: "We the jury find the defendant gailty as charged
345 in the indictment."

Motion for new trial was made and continued to June 27, 1957.

On motion for a new trial the following proceedings took place:

354 Mr. Bellows informed the Court that a day or two after defendant was found guilty, Mr. Smith called him and said Faye Jackson wanted to talk to him. He agreed to talk with her and had a court reporter present when the defendant brought her in. She said she wanted to change her story, that part of what she said in court was not true, the part in which she said the defendant sent her to Missouri. Mr. Bellows said he warned her that the Court might consider that to be perjury or contempt, and she said in that case she would like to consult with an attorney. Shortly after that Jackson talked to two lawyers and gave them an affidavit which he filed. Mr. Bellows

advised Mr. McGarr and Mr. Connelly of the witness' change of heart and furnished them a copy of the affidavit and a copy of the transcript of Jackson's testimony in his office. (R. 355)

Mr. Bellows said he was ready to put Jackson back on the stand about the change in her story and that was his chief point in the motion for new trial (R. 356). In addition there was a challenge to the array. Mr. Bellows said the prosecutor failed to prove many things set forth in the opening state-
358 ment. He then discussed the evidence.

Mr. Connelly pointed out that paragraph 7 of Jackson's recantation was the only thing relating to the testimony of the witness at the trial and it referred to the defendant sending the victim to Rockford, which was not charged by the Government in the
359-360 indictment.

In the statement the witness gave Mr. Bellows in his office she said everything she said at the trial was true except that Smith did not tell her to go to Missouri or send her, that it was her own idea.

Mr. Connelly cited McGuire *vs.* U. S., 152 F. 2d 577,
361 on the question of inducement.

The case of U. S. *vs.* Barton, 34 F. 2d 484, was cited and language from page 485 quoted to the Court.

The affiant's interpretation of what constitutes sending her to Missouri is obtained by reading the following from page 8 of the statement taken by Mr. Bellows at his office after the trial (R 363):

"Q. Well, did he send you there?"

"A. Well, I got money from him to go there, but he did not send me there, he did not take me to the station and buy a train ticket and put me on the train. Wouldn't you say that was send-

ing me if he took me to the train and bought me a ticket? He did not do that, so I would not say he sent me."

Mr. Connelly cited the case of U. S. vs. Reed, 96 F. 2d 785, where the jury found inducement even though the witness testified she always wanted to go where she went and paid her own transportation.

The case of Larrison vs. U. S., 7th Cir., 24 F. 2d 82, was cited in relation to recanted testimony (R 364).

The case of Martin vs. The U. S., 17 F. 2d 973, was cited in connection with the suspicious circumstances surrounding the obtaining of the affidavit from Wit-
368 ness Jackson.

A material witness warrant was obtained because
369 Jackson had eluded police guards at her home and disappeared.

In connection with the granting of a motion for new trial Mr. Connelly cited U. S. vs. Pruitt, 121 F. Supp. 215, Aff'd. in 217 F. 2d 648, for the general proposition that even if the motion were sufficient, new trials of criminal prosecutions are granted only with great caution; (R 370) and that a motion for new trial is addressed to the sound discretion of the Court, Adams vs. The U. S., 191 F. 2d 206; and that the ruling will be reviewed only where there is a clear
370 abuse of discretion.

Mr. Bellows offered to call the witness Faye Jackson in regard to the recantation and this colloquy
374 took place.

By the Court: "You put her affidavit in, I assume you regarded that as sufficient when you filed it.

By Mr. Bellows: Yes, your Honor.

By the Court: I assume she would say the same thing if she were on the stand."

Thomas W. Parrish, Special Agent of the F.B.I., was recalled as a witness by the Government. He
375 testified that Faye Jackson never told him that Smith did not send her to Waynesville, Mo., and that he told the witness Jackson to tell the truth at the trial. The witness said he never made the following statement: "But it is not fair. If somebody tried to knock your eye out, wouldn't you do whatever you could to see he was punished for it?" He did not exhibit a
376 telegram to Faye Jackson at the County Hospital and she was not contacted six times at the hospital, but three times (R 377).

Q. On page 6 of the statement given by the witness after trial to Mr. Bellows the question was asked:

> "Why did you give a different impression when you testified or intend to give a different impression when you testified in court against him?
>
> A. They had me all frightened. They told me I am on probation in Detroit. They said they were going to see I got some time out of it. I told them up at County, after they arrested me and took me to Rockford, the Rockford County jail, I said I would not testify against Mr. Smith. I said what I was doing, I was doing it before I even knew him. He did not entice me into anything. What I did was because I wanted to do it. The money, I gave it to him because I wanted to, not because he put any pressure on me, which he did not.
>
> "He never asked me for any money. I just gave it to him to take care of me. I was frightened. That was the reason why. I thought I probably would get some time out of it. I had

two people to see me. They said I would get time from it, probation.

"I was out of town. I was frightened. Anything I could do to keep from going into the penitentiary, I would do it, but I said that was not the right way."

Q. "Did you mention anything to this defendant (sic Jackson) at the Rockford County Jail about probation?

A. "I knew nothing of her probation until she volunteered it. Then later I sent to our Detroit office and had it verified."

Agent Parrish further testified that Jackson never told him that Smith did not send her to Missouri and that he never told her to testify that Smith sent her to
379 Missouri. He told her to tell the truth.
380 By the Court: "Motion for a new trial will be overruled and denied. This witness—what is her name?"

By Mr. Connelly: "Faye Jackson."

By the Court: (Continuing)

"Faye Jackson is unquestionably under the control of this defendant. The emotion she feels toward him she doubtless calls and characterizes as love, and she doubtless calls him her sweetheart. There isn't any question about it, she was and is a prostitute.

"I am satisfied that this defendant was living off her earnings, taking her earnings from her, and was not treating her very well at that.

"Undoubtedly she will say when she gets under his influence just exactly what he wants her to say. I have not got the slightest doubt about
381 that.

"If I were not sure that the jury were right I would give him a new trial, but I am sure they were right. I am sure that he is living off the the earnings of this woman, and I am sure that he induced her to change her story.

"I have never yet sentenced a man, fined him or sent him to jail or sent him to the penitentiary unless I was satisfied beyond all reasonable doubt that he was guilty, and that is what I feel about this man. If I did not feel that way I would not fine him, I would not sentence him, I would not put him on probation, I would not convict him.

"I am satisfied beyond all reasonable doubt this defendant is guilty of the crime of which the jury found him guilty."

(R 382) By the Court: "Let the defendant be committed to the custody of the Attorney General for a period of five years on Count 1 and let him be committed to the custody of the Attorney General for a period of five years on Count 2. Let the sentences run concurrently."

392 Certificate of the Clerk.